

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CIVIL ACTION 2:14-CV-8063-SDW

SPECIALIZED LOAN SERVICING, : TRANSCRIPT OF PROCEEDINGS  
LLC, :

Appellee : M O T I O N

-vs- :

GORDON ALLEN WASHINGTON, : Pages 1 - 19  
Appellants :

- - - - -

Newark, New Jersey  
June 18, 2015

B E F O R E: HONORABLE SUSAN D. WIGENTON,  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

CHARLES A. GRUEN  
BY: ROSA AMICA-TERRA, ESQ.  
-and-  
WALTER D'NEALY, ESQ.  
Attorneys for the Appellee

BALLARD SPAHR  
BY: ROBERTO A. RIVERA-SOTO  
CHRISTOPHER TOMLIN, ESQ.  
Attorneys for the Defendant

---

Pursuant to Section 753 Title 28 United States Code, the  
following transcript is certified to be an accurate record as  
taken stenographically in the above entitled proceedings.

S/Carmen Liloia  
CARMEN LILOIA  
Certified Court Reporter  
973-477-9704

1 THE COURT: All right. This is the matter of  
2 Washington versus Specialized Loans Servicing, LLC. It's civil  
3 action 14-8063.

4 Counsel, you may enter your appearances, please.

5 MS. AMICA-TERRA: Good morning, your Honor. Rosa  
6 Amica-Terra, from the law offices of Charles Gruen, on behalf  
7 of Gordon Allen Washington.

8 THE COURT: Okay, good morning.

9 MR. NEALY: Water D. Nealy of the offices of  
10 Walter D. Nealy, PC on behalf of Allen Washington. I  
11 represented him as a debtor in the bankruptcy court.

12 THE COURT: Counsel, spell your name for me. I  
13 don't see it on this lovely sign-in sheet, so I just want to  
14 that we have you.

15 MR. NEALY: N-E-A-L-Y.

16 THE COURT: M-E?

17 MR. NEALY: No, N as and in Nancy, E-A-L-Y.

18 THE COURT: Gotcha, very well.

19 MR. RIVERA-SOTO: Good morning, your Honor.

20 THE COURT: Good morning.

21 MR. RIVERA-SOTO: Roberto Rivera-Soto and  
22 Christopher Tomlin of Ballard Spahr, and we appear on behalf of  
23 both SLS and Bank of New York Mellon.

24 THE COURT: Very well. It's good to have all of  
25 you. Everyone, you can have a seat for a second.

1                   This is a request for appellate review as it  
2                   relates to a bankruptcy decision that was issued by Judge  
3                   Kaplan in this matter, that opinion having been -- resulted  
4                   from, I should say, a hearing that took place on September  
5                   30th, 2014. And I believe that this opinion was entered on  
6                   November 5th, 2014, or somewhere certainly thereabouts

7                   So with that being said, I have read all the  
8                   submissions that have been provided to the Court. I did not  
9                   bring out the numerous submissions with me now, but I did want  
10                  to give counsel an opportunity to be heard orally, which is why  
11                  we scheduled today's hearing.

12                  So former Justice Roberto Rivera-Soto, if you wish  
13                  to be heard, I'll hear from you first and then I'll hear from  
14                  counsel on the other side.

15                  MR. RIVERA-SOTO: Good morning, your Honor.

16                  THE COURT: Good morning.

17                  MR. RIVERA-SOTO: Your Honor, the issue on appeal  
18                  is really fairly straight forward. It's what statute of  
19                  limitations applies?

20                  Judge Kaplan was confronted with what he thought  
21                  was a distasteful, unpleasant task and somehow he went off the  
22                  rails in doing so. The fact of the matter is that the statute  
23                  that is at issue here, which is 2A:50-56.1, is a specific  
24                  attempt by the New Jersey legislature to codify the statute of  
25                  limitations that would apply in a foreclosure action. And it

1 created three separate categories. In Subsection A, it  
2 basically said: If you're going to do an action on the note,  
3 then you must do it within six years of the maturity date  
4 that's on the note, not some maturity date that you can figure  
5 out from someplace else, by the maturity date that's on the  
6 note, or that you can compute from the language on the note.  
7 So that if the note said that it was dated January 1, 1970, and  
8 it was for thirty years, then can you compute on the face of  
9 the note that it's January 1, 2000, thirty years later.

10 The second subcategory says: We have another  
11 grouping of those cases where you have a mortgage, and we're  
12 going to presume that mortgages are normally, and these are  
13 just residential mortgages, normally for a 30-year period and  
14 therefore we're going to give you 30 plus 6, six being the  
15 statute of limitations.

16 And then there's the last category, and the last  
17 category talks in terms of what you do, not on an action on the  
18 note, but on an action in forfeiture under the mortgage. And  
19 it specifically says that you have 20 days -- 20 years, I'm  
20 sorry, from the date of default.

21 Now, here, by sort of trying to put a square peg  
22 in a round hole, Judge Kaplan decided that really what applied  
23 was Subsection A. And that since more than six years had  
24 elapsed from what he viewed to be the accelerated maturity  
25 date, which you cannot tell from the face of the documents, but

1 he decided that maturity date also meant that, that therefore  
2 the claim was time barred. That is clearly wrong, with all due  
3 respect to Judge Kaplan, it's just wrong.

4 And as we've noted to the Court in the submission  
5 that we made yesterday, there have been two cases in the  
6 Superior Court that have addressed it, one from the Morris and  
7 Sussex vicinage, that was issued by Judge Hansbury, who is the  
8 presiding judge in equity out there, and he rejected Judge  
9 Kaplan's analysis completely. And the second one was from  
10 Judge Robert -- I believe it's Roberts, from Hudson County, and  
11 she too rejected Judge Kaplan's reasoning completely. These  
12 are both unpublished decisions that clearly are unpublished  
13 because, as your Honor knows, trial court decisions in New  
14 Jersey are not published until they satisfy the criteria of the  
15 Committee on Opinions. And the Committee on Opinions will not  
16 authorize the publication of a trial court decision while a  
17 case is still pending. So those are not published but the  
18 restrictions of New Jersey Rule 1:36-3 do not apply to this  
19 Court. This Court can take them into account and can consider  
20 them in making a determination.

21 But more importantly, those two decisions make  
22 sense. If the construct that Judge Kaplan applied were in fact  
23 correct, then Subsection C of the statute of limitations that  
24 the legislature adopted specifically for mortgage foreclosure  
25 actions, would become superfluous. It would never get there,

1 because you would also be barred under either A or B, but  
2 principally A. Clearly the legislature adopted Subsection C  
3 for a reason. And they told us why they did so. They did so  
4 because they were reacting to an Appellate Division decision  
5 that said: By the way, guys, there is no statute of  
6 limitations in New Jersey for mortgage foreclosure. So what we  
7 are going to borrow is the statute of limitations for adverse  
8 possession. The legislature looked at that opinion and said:  
9 The logic seems right, the times seem right, and we do need to  
10 deal with this because the purpose of the mortgage -- of the  
11 Fair Foreclosure Act is to ensure that we give homeowners every  
12 possible chance to try to redeem their debts. Putting a  
13 shorter time period on this will not get there. And we  
14 certainly can't have the note holders being subject to events  
15 that are outside of their control. Let me give you an example  
16 of that.

17 When the mortgage foreclosure process hit in New  
18 Jersey and the crisis occurred, the State of New Jersey  
19 basically halted all mortgage foreclosure actions. Stopped  
20 them. And a statewide analysis was done, handled by Judge  
21 Jacobson in Mercer County, the now Assignment Judge there, and  
22 rules were created in order to -- how they were to be handled.  
23 But the delay was several years in duration.

24 If the analysis that Judge Kaplan adopted were in  
25 fact the law, every single mortgage holder would be prejudiced

1 by that delay, yet it had nothing to do with anything that they  
2 did. And that cannot be the law. It simply cannot.

3 So for all of those reasons, we respectfully  
4 request that the Court reverse the determination of Judge  
5 Kaplan and find that the claim that is being presented here by  
6 SLS and Bank of New York Mellon goes under Subsection C and  
7 therefore it is timely. Thank you, your Honor.

8 THE COURT: Thank you.

9 Alright, Miss Amica-Terra.

10 MS. AMICA-TERRA: Good morning, your Honor.

11 THE COURT: Good morning.

12 MS. AMICA-TERRA: Judge Kaplan used a holistic  
13 approach in interpreting the Fair Foreclosure Statute of  
14 Limitations as he's required to do when a Federal Court is  
15 interpreting a New Jersey State. The Court first look at the  
16 plain language of the statute, gave the legislatively chosen  
17 words their generally accepted meanings. He looked at the  
18 statute has a whole in relation to the statutory scheme. He  
19 found that neither acceleration nor maturity was defined in the  
20 Fair Foreclosure Act. Finding the language to be ambiguous, he  
21 then referred to the legislative history, which he also found  
22 limited in guidance as to whether the term "maturity date" in  
23 the statute of limitations includes an accelerated maturity  
24 date.

25 The legislative history refers to matching a

1 six-year statute of limitations on actions based upon contract.  
2 However, the history did not specify whether it meant N.J.S.A.  
3 2A:14-1, which is applies to contracts which is neutral on  
4 acceleration or maturity, or whether the legislator was  
5 referring to N.J.S.A. 12A:3-1(18), which applies to negotiable  
6 instruments, and states that the statute of limitations does  
7 apply to the accelerated due date. In light of the fact that a  
8 mortgage is a negotiable instrument, Judge Kaplan's decision,  
9 which applies the statute of limitations to the accelerated  
10 maturity date, is not clearly erroneous in his attempt to  
11 interpret an ambiguous statute.

12 The statute of limitations provides two distinct  
13 dates from which to apply the six-year statute of limitations:  
14 The date fixed for making the last payment, or the maturity  
15 date. A date fixed is static, but a maturity date can be  
16 advanced if the loan documents permit. In this case, the loan  
17 documents did permit acceleration of the maturity date and the  
18 lender opted to exercise that remedy.

19 The Fair Foreclosure Act also permits  
20 acceleration. But similar to the loan documents, does not  
21 require acceleration. It uses the term "may" rather than  
22 "shall" and permits a foreclosing lender to only foreclose on  
23 unpaid installments of principle and interest and still  
24 maintain their in rem mortgage lien on the property.

25 These appellants using the terms contained within



1 the four corners of note and mortgage exercised their remedy of  
2 accelerating the debt. And by doing so, accelerated the  
3 maturity date. It was in their control as to whether to  
4 accelerate.

5 Appellants conceded that the six-year statute of  
6 limitations already expired on the note. Their statutory  
7 interpretation would allow a lender to accelerate the debt and  
8 then still have 20 years to commence foreclosure proceedings,  
9 which we believe is contrary to the principles of judicial  
10 economy and would reward the lender for failure to correct  
11 deficient pleadings and reward them for sitting on their rights  
12 for another 20 years.

13 The appellants' argument that Judge Kaplan's  
14 decision renders Subsection C as superfluous or insignificant  
15 is also flawed. Subsection C would still apply when a borrower  
16 defaults and the lender takes no action, in accordance with the  
17 concept of adverse possession. If a lender does not accelerate  
18 the debt, it would still be afforded a 20-year statute of  
19 limitations from the date of default. Again, there's no  
20 obligation for the lender to accelerate the debt under the loan  
21 documents or the Fair Foreclosure Act. It's a remedy that they  
22 may opt. And although acceleration may be a standard in a  
23 lending industry, it's not required.

24 With respect to the two cases that were submitted to  
25 your Honor yesterday. It was our first opportunity to review

1 the cases too. We believe the case out of Morris County by the  
2 decision written by Judge Hansbury, he specifically  
3 distinguishes his case from this case. Also, those cases are  
4 still -- they're still within the timeframe to appeal.

5 And if the Fair Foreclosure Act is meant to give  
6 homeowners every opportunity to save their homes, if a lender  
7 only foreclosed on outstanding principle or interest payment,  
8 it would give the borrower more of an opportunity to foreclose  
9 if the debt is not accelerated.

10 And although the state foreclosures were stayed  
11 for a period of time, that stay was lifted and the complaint in  
12 this particular case was not dismissed until almost a year  
13 after the stay was lifted. So the lender did have ample  
14 opportunity to continue with the original foreclosure filing.  
15 In fact, they received more than 30-days notice that the  
16 complaint would be dismissed if they did not take action.  
17 Action was not taken and thus the complaint was dismissed.

18 THE COURT: So, because I notice the Bankruptcy  
19 Court had a stay in this case until March 12. What was that  
20 for?

21 MS. AMICA-TERRA: No, March 12 was the date of the  
22 bankruptcy filing. So at that point they became stayed. But  
23 the original complaint was dismissed in July of 2013. The  
24 lender's counsel received notice, I believe it was May 25th,  
25 that the foreclosure would be dismissed within 30 days if

1 action was not taken.

2 THE COURT: Okay.

3 Alright, I also have just received the cases. I  
4 mean, I only saw them this morning, so I don't know at what  
5 point yesterday they were filed, but I have not had a chance to  
6 read them or digest them, so.

7 MR. RIVERA-SOTO: I understand that, your Honor.  
8 If I can brief rebuttal?

9 THE COURT: Sure.

10 MR. RIVERA-SOTO: Let me address the points  
11 counsel made, not necessarily in the order in which they were  
12 made, but let me start actually with the last one. As a matter  
13 of fact, what counsel was referring to was the dismissal of the  
14 original foreclosure complaint in state court.

15 THE COURT: I see.

16 MR. RIVERA-SOTO: That happens administratively.

17 THE COURT: Right.

18 MR. RIVERA-SOTO: Okay. So there's no substantive  
19 determination made in respect of that.

20 Now, counsel talked about the Fair Foreclosure Act's  
21 purpose, which is to provide homeowners with every opportunity  
22 possible to save their homes. We don't disagree with that.  
23 But every opportunity possible to save their homes does not  
24 translate into getting a windfall. And that's what they're  
25 seeking here. Let's make sure we remember what this case is

1 about. This mortgage was taken out in February of 2007. The  
2 first mortgage payment was due April 1st, 2007. This mortgage  
3 went into default in July of 2007. It is now eight years later  
4 and not one mortgage payment has been made in that period of  
5 time. And this debtor wants this Court to ratify his behavior  
6 and give him what should now be about a million dollars'  
7 windfall.

8 THE COURT: Nine hundred I think at one point.

9 MR. RIVERA-SOTO: At one point. But by this point  
10 if they added my fees, it should be better than a million.

11 THE COURT: But that's sort of what Judge Kaplan  
12 talked about too. I mean, obviously the default occurs very  
13 early once this loan is begun. I mean, payment is made in  
14 April, payment is not made as of July, 2007. And the issue  
15 becomes, nothing gets done. The mortgage gets accelerated, and  
16 then nothing else is done, so.

17 MR. RIVERA-SOTO: Well, but the rationale that  
18 under Gurd's (ch) why -- what was done or was not done still  
19 remains, and that is, the full understanding that you had 20  
20 years within which to file a foreclosure action. So there was  
21 no rush in doing it. Secondly, it was just as the mortgage  
22 foreclosure crisis was hitting full stride. So even if you  
23 filed a foreclosure, where are you going with it? Nothing was  
24 happening. People were working with mortgagors. There were  
25 programs that were instituted, like the Homeowner's

1 Modification Program, or HAMP or HARP, whatever those acronyms  
2 stand for, that were all being done in order to try to address  
3 what was something that was systematic. Was not unique or  
4 idiosyncratic to any given lender or, in fact, any given  
5 borrower. Because the reasons were as multiple as there were  
6 people who were involved. But the fact of the matter is, that  
7 everyone in their -- I wanted to say right mind, but that may  
8 be a little too harsh, was of the view that you had 20 years  
9 within which to file your mortgage foreclosure action. Because  
10 the Appellate Division said it, and then the legislature in New  
11 Jersey amended the Fair Foreclosure Act to provide for it.

12 Now, what's the alternative? And that's the part  
13 that counsel did not talk about. What's the alternative? The  
14 alternative then is that in July of 2007, when the first  
15 default occurred, the bank could have sued for foreclosure and  
16 said: You are in default for the month of July, 2007. And  
17 then when he didn't pay in August, they'd have to amend the  
18 complaint to say: Now you haven't paid in July and August of  
19 2007. And when he didn't pay in September, they now have to  
20 amend the complaint again to say: You haven't paid now in  
21 July, August and September. The notion is ridiculous. The law  
22 cannot provide --

23 THE COURT: If you look at it that way. But the  
24 next argument is, why don't you follow it a year later, when  
25 you don't have to do it each month, a year later?

1 MR. RIVERA-SOTO: Even if you filed it a year  
2 later --

3 THE COURT: Two years later.

4 MR. RIVERA-SOTO: -- according to this theory, I  
5 can only file for the months in which he was in default.  
6 Because if I accelerated the loan, if I accelerated the loan  
7 under debtor's theory, I now could no longer take advantage of  
8 Subsection C, but I was now stuck under Subsection A, which  
9 gives me six years instead of 20.

10 THE COURT: So --

11 MR. RIVER-SOTO: Because -- I'm sorry to  
12 interrupt, your Honor.

13 THE COURT: Go ahead.

14 MR. RIVERA-SOTO: To close the thought. Because  
15 under their theory, an accelerated maturity date is the same as  
16 maturity date as defined in Subsection A of the statute. That  
17 can not be.

18 Why not? The statute itself says you get six  
19 years "from the date fixed for the making of the last payment  
20 or the maturity date set forth in the mortgage, or the note,  
21 bond or other obligation secured by the mortgage," which means  
22 it's got to be on its cover, "whether the date, itself, is set  
23 forth or may be calculated from information contained in the  
24 mortgage or note, bond or other obligation."

25 Well, an accelerated date can never come from the

1 mortgage, note, bond or other obligation. It will always  
2 come -- excuse me, it will always come from some event  
3 extraneous to the note, bond, mortgage or other obligation. It  
4 will come because there's been a default. That will not appear  
5 from the four corners of the document that creates the  
6 obligation. So we clearly cannot be stuck to that because that  
7 can not be defined. And it is simply a bit of legal wizardry  
8 to say: Well, the maturity date was accelerated and therefore  
9 the maturity date is now the new accelerated maturity date.

10 Well, perhaps you could do that in the abstract.  
11 But here you can't do it. Why? Because the legislature knew  
12 what acceleration meant. And if your Honor will note in our  
13 reply brief, starting at page 5, we give your Honor the  
14 examples within the four corners of the Fair Foreclosure Act  
15 where the legislature specifically spoke as to accelerated  
16 debts. It knew how to say it. And it did not say it here.

17 And the principle, I now start back at where  
18 counsel started. The first thing that counsel told the Court  
19 was: This review has to be holistic because that's what Judge  
20 Kaplan did. I couldn't agree with her more. I would state the  
21 proposition a little bit differently. I would state that it is  
22 the obligation of the Court to read a statute so as to give  
23 meaning to all of its sections, not one to the preference of  
24 others. And if the statute is read as Judge Kaplan has  
25 proposed, then Subsection C is superfluous and unnecessary

1 because always Subsection A will trump. There's a reason for  
2 Subsection C. And it is the Court's obligation to give it its  
3 vibrancy and its relevance.

4 THE COURT: But you heard the example cited by  
5 counsel as it relates to a circumstance under which Section C  
6 would be applicable. What's your thought in that regard?

7 MR. RIVERA-SOTO: I don't think their example  
8 makes a whole lot of sense. Because in my view, Section --  
9 Subsection C applies any time you're talking about foreclosing  
10 on the mortgage. Not an action on the note, but foreclosing on  
11 a mortgage. So that, to a large degree, the note becomes  
12 almost irrelevant. It's the right to secure the collateral  
13 that is the issue under C, it's not the underlying obligation.

14 So when I hear counsel's explanation, my thought  
15 is: You're mixing apples and oranges, because they do not  
16 belong together. Subsection C talks about foreclosure on the  
17 mortgage. Because, frankly, if you were to say: Well, what do  
18 you do in respect to the note? In my view, Subsection A is  
19 interesting, but in some degree unnecessary, because the UCC  
20 provides for the statute of limitations on a negotiable  
21 instrument, which is what a note is. And it says it's six  
22 years.

23 All Subsection A does is import the UCC's statute  
24 of limitations to this context. Which, by the way, is the New  
25 Jersey general statute of limitations for breaches of contract,



1 which is, again, all a note is. It's a contract. But we view  
2 mortgage foreclosure differently. We do not view mortgage  
3 foreclosure as a breach of contract. We do not view mortgage  
4 foreclosure as an obligation under a note. We view mortgage  
5 foreclosure as collection on security for a debt, which is  
6 different from the debt, itself. That's why we have two  
7 instruments, a note and a mortgage. That's why the note is not  
8 recorded but the mortgage is. And the reason for that is to  
9 provide fair notice to anybody else of the underlying  
10 obligation here. And that someone may stand in your title  
11 chain. That's why. So to a large degree, it's an interesting  
12 analogy, but it's irrelevant. Because what matters here is  
13 that we're talking about a mortgage foreclosure, not an action  
14 on the debt.

15 THE COURT: Alright, very well.

16 MR. RIVERA-SOTO: Thank you, your Honor.

17 THE COURT: Thank you.

18 Alright. And, Miss Amica-Terra, anything else you  
19 want to add? You don't have to. I know lawyers are always  
20 scared not to if they're asked.

21 MS. AMICA-TERRA: Just the last.

22 THE COURT: Because I did ask some questions, so I  
23 want to make sure that there's nothing you wanted to add.

24 MS. AMICA-TERRA: Appellants argue that Subsection  
25 A only apply to notes. There's already a statute that applies

1 to notes. And it wouldn't make sense if that statute only  
2 applies to notes when it is part of the Fair Foreclosure Act.

3 And the legislative purpose of this statute of  
4 limitations is to clear title on actions that can not be -- on  
5 loans that can no longer be ensure forced.

6 This action was commenced in 2007. They  
7 weren't -- these foreclosure matters were not stayed until, I  
8 believe it was late 2010 or sometime in 2011. They were  
9 notified of deficiencies in their final judgment -- motion for  
10 final judgment of foreclosure as early as 2010, and never took  
11 action to remediate.

12 Finally, a lender would always know when the  
13 accelerated date is because the acceleration is in the control  
14 of the lender and not of the debtor. So they would have the  
15 information necessary to know that an action must be commenced  
16 within six years from the date that they chose to accelerate  
17 the debt.

18 Thank you, your Honor.

19 THE COURT: Alright, very well.

20 Alright. With that being said, counsel, thank  
21 you. I will take it under advisement. I will issue an  
22 opinion. It will give me an opportunity as well to read and  
23 digest the persuasive authority that has been submitted as of  
24 yesterday.

25 So, thank you, and you will hear from the Court.

1 MS. AMICA-TERRA: Thank you, your Honor.

2 MR. RIVERA-SOTO: Thank you, your Honor.

3 (Matter concluded)

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

